

**TAB 8**



MANAGEMENT TRAINING  
FOR  
ARMORED MOTOR SERVICE OF AMERICA, INC.

"SEXUAL HARASSMENT"

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NEW ENGLAND BRANCHES  
Marlborough, Mass.

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**TYPES OF SEXUAL HARASSMENT**

TYPE	BEHAVIOR	HARASSER
Physical	Any kind of unwanted touching, fondling, patting, hugging, pinching, kissing.	Supervisor, subordinate, co-worker, supplier, vendor, customer.
	Any type of physical contact.	Any person invited into the workplace for any reason.  Can occur after work or in social situations under some circumstances.
Verbal	Any kind of questions and/or comments about a person's sexual behavior, sexually oriented jokes, comments about a person's body, any kind of conversation with sexual innuendo, any kind of double meanings.	Supervisor, subordinate, co-worker, supplier, vendor, customer.  Any person invited into the workplace for any reason.  Can occur after work or in social situations under some circumstances.
Nonverbal	Displaying sexually suggestive pictures or objects in the workplace. This can include tee-shirts, hats, coffee mugs, cartoons, posters, signs, calendars.  Leering, staring, or ogling in a sexually demeaning manner, or a manner that is perceived to be demeaning.	Supervisor, subordinate, co-worker, supplier, vendor, customer.  Any person invited into the workplace for any reason.  Can occur after work or in social situations under some circumstances.

### SEXUAL HARASSMENT SEMINAR

All employees have the right to work in an environment free from unfair practices or harassment. Dignity, fairness and respect should be the standards in every workplace.

Employees are specifically protected through various Human Rights regulations against the unfair treatment of employees and the effect of "adverse impact." Adverse impact means that we treat an individual or a group in an unfair way because of their race, color, creed, age, sex, national origin, physical or mental non-job related disability, non-job related conviction record or veteran or marital status.

When an individual or a group can show we have treated them with adverse impact, they can often prove we have treated them in a discriminating manner. The courts or other legal systems often then compensate them significantly.

One of the most controversial areas of treatment is about harassment, and specifically sexual harassment. An employee who feels we have harassed them not only has the state specific Human Rights Commission and the Federal Equal Opportunity Commission to complain to, they can often find more responsiveness in the civil or criminal justice system. The civil court system provides a place for claimants to litigate for large financial awards. The criminal justice system places formal charges against an individual whom the police then arrest.

**Many federal court cases affirm that supervisors can now be held financially responsible for their actions with the employer for whom they work.** A supervisor used to be personally protected from civil liability, the corporate entity was responsible for the actions of one of their employees. **Not anymore! Litigants are now able to sue supervisors personally plus the corporate entity they believe harassed them or allowed harassment to occur.** In fact, if a litigant wins a suit against one they almost automatically win against the other party.

Charges of harassment filed with a law enforcement agency can only be investigated and adjudicated through the court process. Action is taken against a particular individual who represents the company, but a company cannot be arrested. We are going to discuss this topic outside the criminal justice system, although many of the same policies and procedures put in place to simplify an investigation of a complaint filed internally, can be extremely helpful in any individual's defense within the criminal justice system.

One area that most employees and employers are now aware of is that sexual harassment is actually a misnomer. The term infers that actual sexual harassment must have occurred. That is not true. Sexual harassment occurs when we harass or treated an employee differently because of their sex, even if there is nothing sexual about the actions. The term actually refers to disparate treatment because the person is of a particular sex.

It is clear through regulations and precedent court decisions that an employer is responsible for the actions of one of their employees, whether or not the acts were sanctioned or specifically forbidden, and despite whether or not the employer should have known of their existence or not.

An employer can also be responsible for the sexual harassment of its employees by non-employees and among fellow employees if it knew or should have known about the conduct and failed to take action.

Vendors and visitors can also harass employees, and other full or part time employees.

### When Is a Work Environment Hostile?

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- \* When sexual harassment is severe and pervasive enough to alter the victim's employment conditions and create an abusive work environment
  - \* When sexual conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive environment
  - \* Many verbal actions occur
  - \* Single touching actions occur

We have already stated that all employees have a right to work in an environment free from all forms of discrimination and conduct that can be considered harassing, coercive, or disruptive. Sexual harassment certainly fits in one of those categories!

**Sexual harassment is unwelcome sexual advance, verbal or physical (physical can include visual) requests for favors and other verbal or physical conduct of a sexual nature when:**

- 1) submission to an act not related to normal workplace behavior is either an explicit or implicit term or condition of any employment related matter
- 2) submission or rejection of that act is used as a basis for making employment related decisions
- 3) the conduct has the effect of substantially interfering with an individual's work performance, creating an intimidating, hostile or offensive work environment
- 4) the same or similar conduct by non-employees such as customers, vendors or third parties if the employer has some degree of control to stop the improper behavior

These items are determined at the time a complaint is resolved. Remember, what is inoffensive to one individual may be extremely offensive to another.

A very good rule to follow is:

- \* ***If it does not belong in the work place, do not bring it there.  
In fact, do not...bring it, distribute it or discuss it at work!***

It is best to assume that if conduct affects or offends a particular employee, the employee who is offended is the one who keeps a lawyer on a retainer.

What are some examples of what does not belong in the workplace? Non-work related...

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|--|-----------------|--------------|
| * jokes  | * posters       | * pictures   |
| * comments   | * recollections | * desk items |
| * tee shirts or hats   |                 |              |
| * or any other material that may offend someone or provide an offensive work environment |                 |              |

Participation by some employees does not mean all employees are enjoying a particular conversation. Not all employees want to look at the same magazines, posters or literature as others do.

Remember, various government agencies and courts have determined that employees have the right to a work place that does not offend them. Besides the legal issues, it has long been proven that an atmosphere of cooperation and fairness results in good morale and increased productivity. The opposite is also true.

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The actual purpose of the policy is to:

- 1) inform employees about the company's position
- 2) protect employees from unwanted actions of others
- 3) protect the company from frivolous or unwarranted charges affecting the organization
- 4) provide a mechanism to deal with policy violations

The position of the company is that sexual harassment is misconduct. No employee should be subjected to unsolicited or unwelcome sexual overtones, or conduct whether it is of a verbal or physical nature.

The Company does not tolerate behavior that . . .

- 1) is personally offensive
- 2) effects morale
- 3) interferes with work effectiveness

Actions like those described lead to corrective disciplinary action, up to and including discharge after we do a through investigation.

### **MANAGEMENT'S RESPONSIBILITY**

It is the responsibility of management to

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|-----------------------|---|
| 1) create a policy    | 2) communicate the policy                     |
| 3) enforce the policy | 4) investigate complaints of policy violation |

Management is specifically responsible for taking action against acts of sexual harassment by any employee to others concerning employment, whether the act complained of was sanctioned or specifically forbidden, and whether or not the company knew or should have known of the occurrence.

Who is "Management?"

- 1) The Company has determined that Management is all of you!
- 2) The Courts have determined that Management is any person in a position of any kind of authority

### **IMPLEMENTATION OF THE POLICY**

Management is responsible for notifying all employees of the policy, and the procedure to follow in filing a complaint. One method of notification is the Employee Handbook.

A Manager who suspects an employee of conduct described above should address the issue with that individual before an affected party files a complaint.

It is critical to make that employee understand that their actions are inappropriate and are not tolerated. Retaining their job depends on their behavior. All complaints of impropriety should be reported to designated Management immediately. If any employee contacts a supervisor with a complaint, the supervisor must immediately notify senior Management and assist in the investigation.

#### How To know When Sexual Conduct is Unwelcome

- \* A complaint is filed with any member of Management at the time of an incident
- \* An employee verbally or obviously is uncomfortable with another's action.
- \* A complaint is filed with a member of management after a period of time.
  - MYTH: a complaint not immediately filed will not be considered
  - FACT: an employee has one year, and sometimes longer, to file a complaint.

#### What if an employee joins in the activity?

- \* The act may not meet the level of involvement to warrant a complaint, until the employee says "STOP"
- \* The act may not be offensive the participant you would think would be offended by the act, it may be offending someone else

#### What if the employee started the talk or act?

- \* Many Court decisions have conflicting determinations: there are no clear lines between starting, continuing and offending
- \* The employee can be accused of starting harassment against others

#### What if an employee agrees to a supervisor's advances?

- \* Advances may not rise to the level of harassment, until the employee says "STOP"

### CONDUCTING THE INVESTIGATION

An investigation must begin when the complaint is filed. Even if the claim appears frivolous, we must treat it as valid until established otherwise. Use the same procedure to investigate what may appear to be a frivolous claim as one that seems more serious. You do not have sufficient initial information to act otherwise. Remember, historical perspective often reflects the seemingly frivolous is often the greatly significant.

The questions asked are determined by the situation presented. Consider having an outside or independent party, a trained management person totally unrelated to the department and situation, or an attorney handle the investigation. If litigation occurs, the employer must be able to show that a fair and unbiased investigation was held and a reasonable conclusion arrived at. Many courts do not believe that an employer, knowing the parties involved and the potential effects of an action, can act in an unbiased manner. A complaint should never be investigated by an immediate supervisor or anyone in the company in any way affected by the outcome. We handle each investigation differently based on the situations, but follow a similar pattern:

- 1) The first determination: exactly what happened and how does it fit into the company policy.
- 2) Investigate immediately upon notification. Delaying infers it is not important, which may affect witnesses' testimony. Testimony becomes increasingly unreliable over time.



- 3) Limit the number of persons involved to those who must be involved to remain confidential. Only those who "need to know" should. Emphasize that this matter is confidential and they should not discuss it. We should address violations of that policy with corrective discipline. If maintaining confidentiality by any witness is in doubt, consider the effectiveness of their use and stress they must cooperate in confidentiality or serious consequences result.
- 4) Do not reveal information in questions. Ask "~~Have you seen anyone touch an employee in a way that made them feel uncomfortable?~~" instead of "Did you see Paul touch Joan?" The investigation is to gather facts, not disseminate allegations.
- 5) Treat each incident separately if there is more than one. Allegations that arise during open-ended questions also need immediate investigation, but separate from the issue here.
- 6) Never use results as an example or as a training tool to avoid any possible defamation situations. Remember confidentiality.

If submission to certain unacceptable conduct is a term or condition of employment, or rejection of the conduct is used as a basis for employment decisions, it is sexual harassment. One incident may be enough to fire the individual involved, and certainly is sufficient to take severe disciplinary action.

Conduct that unreasonably interferes with work performance, or creates an intimidating, hostile or offensive working environment, is considered "hostile environment" harassment and usually a continuous pattern of conduct is required. Don't let a pattern get established.

#### **WHEN IS AN EMPLOYER LIABLE FOR SEXUAL HARASSMENT?**

Two basic questions are asked to determine liability

- 1) Did the Company know or should it have known that harassment was taking place?
- 2) Did the company take any action to stop the harassment?

An Employer is liable for...

- \* "Quid pro quo" harassment - harassment by someone who has the ability to affect an employee's work conditions
- \* Hostile environment created by supervisors or management
- \* Hostile environment created by co-workers
- \* Conduct by non-employees

Economic harm is not needed for a claim of sexual harassment.

#### **WHAT IS AN EMPLOYER LIABLE FOR? Usually money!**

- 1) Wages an employee lost while out of work
- 2) Damages up to certain limits: 14-100 employees: \$50,000 per act and multiples thereafter
- 3) Jury awards for claims filed in Court - no limits! Pain and suffering, emotional distress, physical distress, medical bills, damaged relationships with loved ones, or inability to work can all constitute parts of a financial award.
- 4) The complaining employee's attorney fees
- 5) Is this covered by insurance? NO!

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## ***Sexual Harassment***

### **An Employer's Solution and Checklist**

Employers everywhere are concerned about employee lawsuits, especially those alleging sexual harassment. Two recent Supreme Court decisions sent a clear message: To avoid liability, employers must demonstrate that they have gone the extra mile to communicate to employees that they do not tolerate harassment of any kind and that they have informed employees of the company's complaint procedure.

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One June 26, the Supreme Court issued two opinions making employers easier targets of suits by employees, even if the employer is not aware of the harassment (*Faragher v. The City of Boca Raton*), and even if the employee suffers no adverse consequences (*Burlington Industries v. Ellerth*). The court held that an employer is responsible for discrimination caused by a supervisor, unless it can: **prove it** took reasonable care to prevent and correct promptly any sexually harassing behavior; and **demonstrate** that the employee failed to take advantage of the employer's well-publicized complaint procedure.

Although many employers respond appropriately to sex harassment complaints when brought to their attention, most cases involve conduct that is not reported to the employer. The four most common reasons for not reporting harassment are: 1) "I didn't know the company had a policy"; 2) "I didn't know who to go to when I had a problem"; 3) "I didn't think the company wanted to know"; 4) "I thought I'd get fired if I made a report".

Because of the recent Supreme Court rulings, employers now have to prove that it was unreasonable for the employee to not come forward. To prove that the company met its obligations, it must: 1) have a zero-tolerance policy and practice; 2) establish and communicate its procedure for reporting violations; 3) explicitly state that the company wants to know of violations when they occur; and 4) ensure that employees will not be fired, demoted, or given punitive assignments because they reported harassment.

*Companies should apply these guidelines:*

- **Put the harassment policy** in writing. This policy should be easy to understand.
- **State in the policy** the employer prohibits all forms of illegal discrimination and harassment.
- **Identify three managers** - at least one female - to whom all complaints and concerns should be directed. Specifically train those persons on how to properly react to complaints of inappropriate conduct. Inform all employees, especially supervisors, of their duty to report inappropriate conduct to the people above. State in the policy that the employer will investigate all claims and not retaliate against anyone. Make sure every employee sees and understands the policy.
- **Have employees read the policy** and sign it. Place a signed copy in their personnel file.
- **Most importantly, train supervisors.** Without proper training, supervisors cannot be expected to know what the law requires of them. Training will assist your company in preventing lawsuits and in defending suits that are unavoidable. Training also evidences your company's commitment to prohibiting discrimination.

**An Employer's Checklist:**

- Create an effective Equal Opportunity policy that prohibits any form of discrimination and harassment;
  - Enforce the policy consistently;
  - Appoint three persons - with at least one female - to hear complaints;
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- Make sure each employee understands the policy and signs a statement saying so;
  - Show all employees a video and have them sign a statement saying so;
  - Post notices of the policy in common areas;
  - Train your supervisors on what the law means;
  - Make a prompt and thorough investigation of any reports of inappropriate conduct;
  - Always promote a professional, respectful, and efficient workplace.

**DEFENSES TO SEXUAL HARASSMENT OR SEX DISCRIMINATION THAT DON'T WORK!**

The following "defenses" have been used as a defense for a decision or action in actual cases in litigation. They didn't work then, they won't work now!

1. "My employer cannot tell me what to say and do - I have constitutional rights."
2. "I didn't mean anything by it."
3. "What I did was not sexual."
4. "We weren't even at work."
5. The Packwood defense - "Alcohol made me do it."
6. "I didn't direct it at anyone in particular."
7. "But no one actually complained."
8. "But she willingly participated."
9. "She couldn't have been offended by that."
10. "As a supervisor, I can't know everything that's going on."
11. "She's really over sensitive."
12. "It only happened once."
13. "There was nothing sexual about what I said."
14. "It's only a calendar."
15. "We laid her off because she doesn't need to work. She has a husband to support her."
16. "We didn't give her the assignment because men are more logical and rational than women"
17. "We wanted a man for this job - it needed stability. Mothers call in whenever kids are sick"
18. "We gave the job to the man because he has a family to support."

## **PREVENTIVE MEASURES**

### **1. DEVELOP A STRONG AND UNDERSTANDABLE POLICY**

Your company's policy on fair treatment and sexual harassment should apply to all categories of employees regardless of their position within the company. Work with a professional on the development of your policy.

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### **2. MAKE SURE THAT ALL EMPLOYEES RECEIVE A COPY OF THE POLICY**

All employees must read and understand the policy and sign an acknowledgment indicating that they have done so. Employees who cannot read or are impaired should be provided with the policy via an interpreter or other appropriate means. Place all signed acknowledgments in the employees' files.

### **3. MAKE AVAILABLE MANAGEMENT AND EMPLOYEE TRAINING**

Educate employees on how to recognize and prevent sexual harassment from happening. Reinforce that the need for dignity and respect among all employees is very important to the smooth operation of the company. Employees found to have committed sexual harassment will be disciplined, up to and including termination.

### **4. MAKE AVAILABLE A THOROUGH GRIEVANCE PROCEDURE FOR EMPLOYEES TO USE**

Allegedly harassed employees must have access to complaint filing procedures. Offer the specific job titles and telephone numbers of management to be contacted and the appropriate order in which to contact them. Be sure to provide several supervisors/managers to contact, in the event that one of the supervisors listed is the alleged harasser.

### **5. INVESTIGATE ALL COMPLAINTS THOROUGHLY**

Take all complaints seriously and thoroughly investigate the alleged incident. Talk to witnesses, seek documentation, etc. Share progress and results of the investigation with the complaining employee.

### **6. PROMISE CONFIDENTIALITY**

Comfort the employees involved by indicating that the matter will be treated as discretely and confidentially as possible. Only selected management and specific employees involved need to be aware of the investigation.

### **7. FOLLOW THROUGH WITH APPROPRIATE ACTION**

Follow through on the discipline strategy that your policy indicates will be used, i.e. written warnings, suspension, reassignment, termination, etc. in the event that the sexual harassment allegations are proven true.

If your investigation does not support the sexual harassment allegation, explain that to the complaining employee. Be sensitive to the complaining employee's position. Allow for the possibility that the complaint was frivolous and use appropriate corrective discipline with the employee who made the allegations.

### BEHAVIOR GUIDE

Following are some questions to ask yourself about your behavior or behavior you have observed.

- \* Would you say it in front of your children? Your parent?
- \* Would you say it if you were going to be quoted on the front page of the newspaper?
- \* ~~Would you gesture like that if your picture was going to be on the front page of the newspaper?~~
- \* Would you say it the same way to a member of your same sex?
- \* Would you behave the same way to a member of the same sex?
- \* Why does it need to be said?
- \* What business need is it furthering?
- \* Do you want your mother treated like that?
- \* Do you want your daughter to have someone just like you for a supervisor?

### POINTS TO REMEMBER

- \* Employees harassing an individual outside their own Company can face two areas of penalty, in addition to the loss of their job:
  - 1) they can be arrested for harassment
  - 2) they can be sued for harassment
- \* Employees/Supervisors can be held personally financially responsible for awards
- \* The victim or the harasser may be of either sex. Harassment may be directed to either sex. The victim and the harasser do not have to be of the opposite sex
- \* The harasser does not have to be the victim's supervisor, or even co-worker. A vendor can be a harasser.
- \* The victim does not have to be the person to whom the behavior or advances are directed
- \* The victim does not have to complain to the harasser or inform the employer
- \* The victim need not suffer a concrete economic injury to receive monetary damages
- \* It is amazing how quickly employees and supervisors stop thinking of harassment as a joke when they realize that committing or tolerating offensive behavior may cost not only their job but their house and car!
- \* Harassment policies are like seat belts - If they aren't used properly they are useless.

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### QUESTIONNAIRE

What is your opinion? Pretend you are the judge. Are the following actions harassment?

<b>Is It Sexual Harassment?</b>	<b>Yes</b>	<b>No</b>	<b>Maybe</b>
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Have you recently observed or committed this conduct on the job?

1. Male supervisor asks a female subordinate for a date that she willingly accepts.
2. Male supervisor kisses a female subordinate on the cheek.
3. Female supervisor often touches subordinates on the shoulder when talking to them.
4. Male supervisor tells a female employee that she must wear tight clothing for safety reasons.
5. Male supervisor uses coffee cup with nude females on it in presence of female subordinates.
6. Female supervisor hires a belly dancer to perform at a party attended by all employees.
7. Male supervisor gives a female subordinate a nice present on her birthday.
8. Male supervisor takes off his shirt during a baseball game where female employees are playing.
9. Female supervisor puts sexually explicit cartoons on her bulletin board.
10. Female supervisor denies a raise to a male subordinate for not going out on a date with her.
11. Male supervisor frequently tells sex jokes to female subordinates.
12. Male supervisor fires female subordinate when she refuses to date him.
13. Male supervisor always calls female subordinates "honey".
14. Married female employee and married male employee are having an affair.
15. Male workers whistle, raise eyebrows, comment, ogle or stare whenever female workers walk into their area
16. Mary can't take a joke about her body or her sex life. Everyone tells her she's a poor sport.

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